No. 83981-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

LISA A. MULLEN

Appellant,

v.

THE STATE OF WASINGTON

Respondent.

APPEALED FROM SKAGIT COUNTY SUPERIOR COURT
CAUSE NO: 02-1-00654-9

SUPPLEMENTAL BRIEF OF PETITIONER LISA MULLEN

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A. Introduction

In 2002, Ron Rennebohm accused his bookkeeper, Lisa Mullen of stealing money from his car dealership. Mr. Rennebohm reported the alleged thefts to the Anacortes Police Department. The State determined that it did not have the resources to investigate this crime and chose to hire the alleged victim's accountant, Rick Rekdal, to investigate and subsequently testify as the State's expert witness. In the course his investigation Mr. Rekdal discovered evidence that showed that Mr. Rennebohm was taking money from his dealership as well as evidence of other misstatements. Mr. Rekdal did not turn this evidence over to Ms. Mullen even though some of it had been subpoenaed and it was favorable to Ms. Mullen's defense.

The evidence that the State withheld was material to Ms. Mullen's defense because it corroborated her defense testimony and impeached the State's two main witnesses. Failure to turn over this material evidence violates *Brady v. Maryland*, 373 U.S. 83 (1963) and as a result Ms. Mullen is entitled to a new trial.

B. Issues Presented for Review

Did the State deny Ms. Mullen due process and violate its duty under *Brady v. Maryland* when it suppressed material evidence?

C. Statement of the Case

Appellant Lisa Mullen was the Bookkeeper/Comptroller at the Ford new car dealership ("Frontier Ford") located near Anacortes, Washington starting in 1993. RP 1/18/06 p. 132. In 2002, the dealership's owner, Ron Rennebohm, accused Mullen of stealing money from the dealership, and reported the alleged "theft" to the City of Anacortes Police Department. RP 1/5/06 p. 71.

During January 2006, more than Four years after the alleged crimes were reported, Lisa Mullen and a co-worker at Frontier Ford, Kevin Dean, were tried in Skagit County Superior Court. Both defendants were convicted by the jury of theft in the first degree, and related counts. RP 2/7/06 p. 2. The jury did not determine the dollar amount of the alleged theft(s). The State's Prosecution accounting expert, Mr. Rick Rekdal, who previously had worked as Frontier Ford's CPA, testified to accounting "irregularities" that may exceed 1 Million dollars. RP 1/25/06 p.181-183. However, although a detailed listing of accounting transactions was provided, neither a specific list of identified transactions nor any claim of exact dollar amounts was testified to was testified to as constituting "theft" by either Ms. Mullen or Mr. Dean. RP 1/25/06 p. 181-183.

Ms. Mullen acknowledged performing all of the alleged "irregular" transactions presented at trial, and provided explanations. RP 1/31/06 p.118-165. First, Mullen testified that all of the transactions were performed under the authority and with the knowledge of business owner R. Rennebohm, including certain transactions that benefited Ms. Mullen. RP 1/31/06 p.119. Secondly, Ms. Mullen testified that the bookkeeping methods and accounts, including the "irregular transactions", were either created by or known to Frontier Ford's outside accountant/CPA during the time period in question. That accountant/CPA was Rick Rekdal, who was also Mr. Rennebohm's personal accountant. RP 1/31/06 p.126-129.

The State's case against Ms. Mullen (and, by association, Mr. Dean) was necessarily based on the "Expert" testimony of the accountant/CPA hired by the State to prepare summaries, and who then testified to "irregular" transfers and/or procedures used by Mullen. That "Expert", paid over $230,000 by the State, was Frontier Ford and Mr. Rennebohm's former CPA, Mr. Rekdal. RP 1/5/06 p.87, 1/30/06 p.94-95, CP 4495-4505.

What the jury was not told was that during 2004, after being hired by the State to prepare summaries and to testify as an expert for the prosecution, with the permission of his clients Frontier Ford and Mr. Rennebohm, Mr. Rekdal terminated his professional relationship with both

Frontier Ford and R. Rennebohm after discovering financial misstatements by both. CP 5389, 5576, 5587-88. Before that time, however, R. Rekdal working for Frontier Ford had prepared and submitted on behalf of Frontier claim documents requesting insurance coverage for the alleged employee "embezzlement" as charged against Mullen and Dean. CP 6477

During December 2004, after the insurance claims had been submitted and after Mr. Rekdal terminated his professional relationship with Frontier Ford and Mr. Rennebohm, and with this criminal case pending, Peninsula Auto World, Inc., dba Frontier Ford filed in King County Superior Court a civil matter for damages alleging malpractice by Clothier & Head, P.S., the professional service corporation/CPA firm where Mr. Rekdal was employed as a partner. CP 6795-6801. Uniquely, Mr. Rekdal was not named as a personal defendant, even though the alleged acts of malpractice were primarily directed toward his acts.

Unknown to defense counsel for Mullen or Dean, or apparently to the prosecutor at the time, in April, 2005 the parties to the King County litigation entered into a Stipulated Protective Order, approved by Judge Armstrong, that prohibited the disclosure of discovery and/or documents related to the dispute between the parties. CP 4756-4762. Both Mr. Rennebohm and Mr. Rekdal were bound by the terms of the Agreed

Protective Order even though they were not named individually in the lawsuit. CP 4756-4762.

The King County civil matter centered directly around the allegations of embezzlement asserted against Mullen (and Dean), with Frontier alleging that Rekdal had breached his professional duties by not "discovering" the irregular accounting practices allegedly used by Mullen. CP 6795-6801. As later admitted, Rekdal had personal although confidential knowledge of Rennebohm's direct involvement and approval of the practices, and Rekdal was or became aware that Rennebohm was benefiting from the practices and under reporting taxable income. Rekdal asserted this information as a defense to Frontier's claims.

The criminal trial commenced on January 5, 2006. RP 1/5/06 p. 68.

Mr. Rennebohm, the complainant and "victim" of the alleged theft, testified for the prosecution on January 18, 19, 20, and 23. RP 1/18-1/20/06 & 1/23/06. Mr. Rekdal, the State's expert witness and Mr. Rennebohm's/Frontier Ford's CPA during the entire time periods of the alleged theft, testified for the prosecution on January 24, 25, 26, 27, and 30. RP 1/24-1/27/2006 & 1/30/06. The State rested on January 30, 2007. RP 1/30/2006 p. 106, lines 4-5.

Unknown to defense counsel during the criminal trial (or to the Court) during those days of testimony, the corporate entities for the two

primary witness's were facing motions to compel, for sanctions, and for dismissal in the King County civil matter. The stakes were high. CP 5968-5973.

On January 6, 2008, Rekdal's counsel filed a motion to compel and for sanctions against "Frontier", or Rennebohm, with a hearing date of January 17, 2008. CP 5968-5973. Further pleadings were filed 1/13; 1/17; and 1/18 – all under seal, and therefore unable to be discovered by the Defendant. CP 5965-66. Judge Armstrong granted the motion, in part, on 1/17 but filed and provided it to the parties on 1/19—*while Mr. Rennebohm was testifying in the criminal matter.* CP 5968-5973. Sworn answers were due from Frontier / Rennebohm in 5 days, or barred. In response, Frontier's counsel served a notice of deposition and document subpoena on Rekdal on 1/26 – *while Rekdal was testifying in the criminal matter* – for a deposition to be taken on 1/31/2008. CP 5577-5580.

During the weekend of 1/28-1/29, the prosecutor allowed Mr. Rekdal to borrow and "produce" to Frontier's counsel, in Seattle, all of the State's exhibit notebooks, while Mr. Rekdal was still under oath and testifying as the State's expert witness. CP 5579. Mr. Rekdal was finally dismissed on January 30, and then deposed the next day by Frontier's counsel. 1/30/06 RP 27; CP 6466-6531.

Mr. Rekdal's defense deposition testimony given on 1/31/2006 – while the criminal trial was continuing—differed significantly from his expert testimony at trial for the prosecution. Compare, CP 6466-6531 & RP 1/24/06, 1/25/06. Most significantly, in the deposition he described in detail his actual knowledge of Mr. Rennebohm's significant involvement in the "irregular" transactions used by Ms. Mullen at Frontier Ford for many years. CP 6466-6531.

Lisa Mullen commenced testifying in her own defense to the criminal charges later on the same day—January 31, 2006. RP 1/31/06 p.117. In what is one of those unexplainable twists of fate, Ms. Mullen's testimony matches many of the same disclosures made by Mr. Rekdal during his concurrent defense deposition offered against the civil claims of Mr. Rennebohm. Compare, RP 1/31/06 p. 120, 160; CP 6466-6531. Mr. Rekdal could not have heard Ms. Mullen's defense testimony at the time he testified in the January 31, 2006 deposition, as she did not even take the stand until later in the day. RP 1/31/06 p. 117.

In Mullen's criminal trial, Mr. Rekdal's testimony was contrary to and in opposition with Mullen's factual testimony. While testifying in defense of himself, under a Stipulated Protective Order, Mr. Rekdal's factual testimony corroborates Ms. Mullen's testimony. CP 6466-6531.

The trial ended on February 6, 2006. RP 2/06/06 p.118. The jury returned a guilty verdict the next day, February 7, 2006. RP 2/7/06 p. 2. In a second twist of fate, Frontier's counsel continued with the deposition of Mr. Rekdal on that very day, February 7, 2006. CP 6560-6601. Again, as allowed under RCW 18.04.405(2), Mr. Rekdal continued to reveal his factual knowledge of Mr. Rennebohm's direct involvement in the "irregular" accounting practices at Frontier Ford that underlay the testimony by both Rennebohm and Rekdal against Mullen. CP 6560-6601.

For a number of unrelated reasons, the sentencing hearing for both Lisa Mullen and Kevin Dean was delayed until 5/19/ 2006. RP5/19/06 p.2.

During the time between February 7 and May 19, there was tremendous activity in the Frontier vs. Clothier & Head civil matter. Trial was scheduled for June 6, 2006. CP 4866-6696. After depositions and additional discovery, counsel for Clothier & Head (Rekdal) filed its Motion for Summary Judgment on March 30 with the hearing scheduled for April 27, 2006. All moving papers and supporting evidence was filed under seal. CP 4866-6696. The supporting evidence included the deposition transcripts of Mr. Rekdal from 1/31/2006 and 2/6/2006.

Judge Armstrong denied the Motion on April 27, 2006. CP 6653-6655. The parties proceeded to a mandatory settlement conference on

May 6, 2006. The parties then reached a confidential settlement, and agreed to dismiss the matter. RP 5/19/06 p.7; CP 4866-6696.

Defendant Dean somehow learned of the settlement, and traveled to the King County Courthouse to review the file. RP 5/19/06 p.5. On or about May 12, just days after the confidential settlement and less than a week before the sentencing hearing, Mr. Dean was mistakenly provided access to the case file by the Court Clerk and was able to copy certain documents. RP 5/19/06 p.7. Those documents revealed that witness's Rekdal and Rennebohm told very different stories in the lawsuit between themselves than they did as witnesses for the prosecution in the criminal matter against Mullen and Dean.

Relying on the information discovered in the King County court file, defense counsel moved to continue the 5/19/2006 sentencing hearing, and subsequently filed motions for a new trial and/or to dismiss. RP 5/19/06 p. 25-36; CP 4066-6696. Arguments were held on November 15, 2006. RP 11/15/06 p.1-84. After review, the motions were denied by the Court. CP 7182-7184. Sentencing was held on December 11, 2006. CP 7199.

The civil case documents revealed the existence of critical defense documents, which had been specifically subpoenaed before trial by Mullen's counsel but withheld from production. CP 6657, 6658; RP

2/2/2006 pg 6,7. These documents, including "PIPI" loan documents, Mullen's employment agreement concerning health insurance reimbursement, and detailed Clothier & Head billing records, all corroborate Ms. Mullen's explanation and defense. If available during trial, the documents would have provided a basis to impeach both Ron Rennebohm and Rick Rekdal and strengthen Ms. Mullen's defense.

D. Argument

1. THE STATE DEPRIVED MS. MULLEN OF DUE PROCESS BY FAILING TO DISCLOSE MATERIAL EVIDENCE

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair trial and a meaningful opportunity to present a defense. U.S. Const. amend. XIV; *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Due process requires the government to disclose to a defendant all material evidence that is either exculpatory or impeachment evidence. *Brady v. Maryland*, 373 U.S. , 87; see also, *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

Under *Brady*, the State violates its due process obligation when it withholds material information. A Brady violation has three components:

> (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued.

Strickler, 527 U.S. at 281-82.

In order to establish the third element of a Brady violation a defendant does not have to show that the withheld evidence would have led to an acquittal but rather, whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

The original holding in *Brady* required the defense to have made a request for the suppressed information. *Brady v. Maryland*, 373 U.S. at 87. However, cases decided since Brady have held that the duty to disclose such evidence is applicable even though there has been no request by the accused. *United States v. Agurs*, 427 U.S. 97, 107 (1976). In this case, we have both situations, some of the evidence was requested and other evidence was only generally requested.

The *Brady* Rule covers evidence known to the Prosecutor as well as evidence known to others acting on the Government's behalf. *Kyles*, 514 U.S. at 437. A prosecutor has a duty to learn of any favorable

evidence known to others acting on the government's behalf. *Id.* This duty exists because it has been found that "a government prosecutor's interest in a criminal prosecution is not that it shall win a case but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

a. The State Withheld Material Evidence

Mr. Rekdal, the State's investigator and expert witness, withheld information he learned in the course of his investigation on behalf of the state that impeached Mr. Rennebohm's testimony and his own testimony and corroborated Ms. Mullen's defense testimony. CP 6899-6912. The information withheld was documents detailing the PIPI loans taken out by Frontier Ford/Ron Rennebohm, detailed Clothier & Head billing records detailing the services performed by Mr. Rekdal on behalf of Frontier Ford/Ron Rennebohm and other documents related to health insurance, termination of CPA services to Rennebohm and the civil lawsuit. CP 6247. The withheld information was material to Ms. Mullen's defense.

Under *Bagley*, the court emphasized four aspects of materiality for Brady purposes bear emphasis. *United States v. Bagley*, 472 U.S. 667. First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus a showing of materiality does

not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. *United States v. Bagley*, 473 U.S. at 682, 685. *United States v. Agurs*, 427 U.S. 97, 112-113, distinguished. Second, *Bagley* materiality is not a sufficiency of evidence test. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *United States v. Bagley*, 473 U.S. at 675. Third, once a reviewing court has found constitutional error, there is no need for further harmless-error review. *Id.* Fourth, the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. *United States v. Bagley*, 473 U.S. at 675, and n. 7.

Prior to trial Ms. Mullen subpoenaed PIPI records, billing records from Clothier & Head and any other favorable material. CP 3495-3499. When the records were not forthcoming Ms. Mullen's counsel went to the court to request that the records be turned over. The defense was told that the PIPI records *did not exist*. RP 3/7/03, RP 10/5/05 p. 14 & 15. Mr. Rekdal and his firm turned over general billing records that were not sufficiently detailed to impeach his testimony that he was minimally

involved in Frontier Ford's business. CP 1073-1081. Ms. Mullen and her counsel requested through the court more detailed records but ultimately they were denied. CP 1073-1081.

After the trial was concluded and shortly before sentencing Ms. Mullen and Mr. Dean were able to obtain documents from a civil suit between Frontier Ford and Clothier and Head. The documents in the civil case had been marked confidential and filed under seal and were mistakenly given to the defendants by a Clerk employee. CP 5855; 5896. In these documents were PIPI records and detailed Clothier and Head billing records that had been withheld from the defendants despite the subpoenas. CP 5857-58; 5292;6247-6461. The civil file showed that Mr. Rekdal had the PIPI documents in his possession since 2005. Mr. Rekdal admitted receiving the subpoena for PIPI documents and that he did not turn the documents over. CP 6835-6859. In addition to the documents that had been subpoenaed by the defense and not turned over, additional exhibits to the Motion for Summary Judgment filed under seal by Mr. Rekdal's counsel contained depositions of Mr. Rekdal, letters, and expert analysis of billing records. The exhibits contradict the testimony of Mr. Rekdal and Mr. Rennebohm at the criminal trial, demonstrated Mr. Rekdal's conflict of interest between being the state investigator and the

private accountant to the victim, and supported Ms. Mullen's testimony. CP 6247-6461(Dec. of Linda Saunders, dated 4/17/06).

1. The PIPI Documents Were Material to the Defense Because They Impeached Mr. Rennebohm and Corroborated Ms. Mullen's Defense Testimony.

The PIPI documents corroborated Ms. Mullen's defense and impeached Mr. Rennebohm. At trial Ms. Mullen testified in detail about the PIPI scheme and how it allowed Mr. Rennebohm to hide profits from business partners and reduce the salaries of Managers such as Ms. Mullen and Mr. Dean and also to reduce his tax liability illicitly. RP 1/31/06 p.118-165. She also testified that Mr. Rennebohm authorized her to purchase items for herself as a reward for assisting him with his financial schemes. RP 1/31/06 p. 119. However, Ms. Mullen had no evidence to corroborate her testimony and in closing she was mocked by the prosecutor for her "story". RP 2/2/06 p. 22. The PIPI documents withheld by Mr. Rekdal prove that Ms. Mullen was telling the truth. The jury was more likely to believe her story if it had been corroborated by the victim's records.

The PIPI documents also impeached Mr. Rennebohm. Mr. Rennebohm was a key witness for the state. Mr. Rennebohm's testimony that he was not aware of the financial transactions at his dealership and that he did not authorize them, were necessary to establish that a crime

was committed. RP 1/18/06 p. 120-219, RP 1/9/06 p. 3-91 (direct exam.). The PIPI documents show that not only was Mr. Rennebohm dishonest in his dealings with business partners and the IRS but also that he was aware of the financial transactions- he was participating in them and benefitting from the "irregular transactions". Had Ms. Mullen been able to demonstrate, with the PIPI documents, that Mr. Rennebohm was involved in the financial dealings the jury may not have believed him when he said that he did not authorize the activity he was claiming as theft. Equally important, it is quite plausible that Mr. Rennebohm would have testified differently had the subpoenaed PIPI documents been produced before trial.

The Appellate Court found that this withheld information was not material but was merely cumulative. Opinion at 11-12. The court reasoned that the defense had already introduced information and testimony that Mr. Rennebohm had been dishonest about his finances during his divorce by giving a former business partner a promissory note that Mr. Rennebohm believed to be "phoney" in order to reduce his net worth. Opinion at 16. However, the former business partner decided to enforce the note and the court (in an unrelated case) required Mr. Rennebohm to pay his former business partner. RP 1/19/06 p.106. When asked about this note by the defense Mr. Rennebohm was able to testify about it in a way that downplayed his dishonesty by basically saying, "I

didn't think the note was valid, the court disagreed with me and I paid up." RP 1/19/06 p. 106. This does not have the same impeaching effect as the PIPI documents that show he was taking money from his employees and business partners, and failing to pay the IRS by reducing the profits of the dealership and having Ms. Mullen hide the evidence with "irregular accounting entries".

This withheld evidence together with the other evidence presented a trial, and Mr. Rekdal's deposition testimony, viewed cumulatively as required by *Kyles* strengthens the impeachment argument against Mr. Rennebohm and cast serious doubt about the truthfulness of his testimony. *See, Kyles v. Whitley*, 514 U.S at 437(suppressed evidence [is] considered collectively, not item by item). This evidence was material and was likely to change how the jury viewed this critical witness.

2. Billing Records and Documents From the Civil Suit Were Material to the Defense Because They Impeached Mr. Rekdal's Testimony.

The withheld evidence also showed that Mr. Rekdal had a conflict of interest in his duties as investigator of the State and accountant to the victim. The malpractice lawsuit defense and the billing records show more extensive involvement in Frontier Ford's business. CP 6247-6461. These records are material to Mr. Rekdal's credibility as the lead investigator and expert witness and would raise serious doubts about the judgments he made in his investigation. This is especially true since the

majority of the evidence against Ms. Mullen was Mr. Rekdal's investigation and subsequent opinions that book keeping entries were "irregular" or for "non-business purposes". RP 9/25/06 (Direct Exam.). Mr. Rekdal was presented to the jury as a neutral investigator who had only done minimal work for the victim car dealership and its owner Mr. Rennebohm. RP 1/24/06 p. 39. Presenting information to the jury of the extensive work he had preformed for the victim and the accusation of malpractice and Mr. Rekdal's defense would have limited the value of his testimony as a neutral investigator/expert witness. The evidence would have indicated to the jury that Mr. Rekdal had a personal stake in the outcome (if Ms. Mullen is found guilty and he was only found to have a limited scope of engagement this would reduce or eliminate his liability in the malpractice suit) and that his duty to his former client (Frontier Ford/Mr. Rennebohm) prevented him from fully disclosing what he knew about the dealerships finances.

The Appellate Court also found this evidence to not be material because it was cumulative or too speculative. Opinion at 18. The evidence was not cumulative. There was no other evidence to impeach Mr. Rekdal.

b. Non-Disclosure is Not Excused Under Brady Because the State Fails to Appreciate The Value of the Evidence to the Defense.

Established "Brady" case law indicates that the State's subjective view of the evidence is not a consideration of whether a Brady violation has occurred. *See, Kyles v. Whitley*, U.S. at 483 (stating the Court is the final arbiter of materiality).

The Appellate Court concluded that no Brady violation occurred because the State failed to appreciate the value of the evidence to the defense. Opinion at 14, 15. This conclusion is contrary to the factual record and established case law.

The court implicitly admitted the evidence was material and excused the non-disclosure stating in its opinion "they had no reason to perceive the exculpatory value of the documents...until Mullen testified at trial", Opinion at 14, and "the prosecutor did not recognize that the entries were significant to the defense", Opinion at 15-16. These two statements conflict with the conclusion that the evidence was not material.

The factual record does not support the State not perceiving the value of the evidence. Some of the evidence was subpoenaed by the Defense putting the State on notice that it was important to the defense. There was no need for the State to make any subjective determination about those documents, they were required to be turned over.

Additionally, Mr. Rekdal did appreciate the value of the withheld information and that is precisely why he withheld it. Mr. Rekdal withheld it because it implicated a former client, the victim in the criminal case. Yet, Mr. Rekdal used the information as a defense to Mr. Rennebohm's claims against him in the same way that Ms. Mullen and Mr. Dean desired to use the information. When asked in the civil trial deposition if there was a connection between Mr. Rennebohm's failure to report income and the allegations against Ms. Mullen and Mr. Dean, Mr. Rekdal invoked the attorney client privilege. CP 6517 (Deposition p. 169). The Appellate Court's conclusion that there was no *Brady* violation because the State failed to appreciate the value of the evidence to the defense is contrary to the record.

c. Failure To Disclose Material Evidence Is Not Excused Under Brady By Speculation That The Defendant Could Have Discovered The Evidence On Her Own.

The Appellate Court concludes that no *Brady* violation occurred in this case because Ms. Mullen could have/should have discovered the information on her own. Opinion at 11. The Court cites *State v. Thomas*, 150 Wn.2d 821, 851, 83 P.3d 970 (2004), (which in turns cites to In re the Personal Restrain of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998)) and *Rector v. Johnson*, 120 F.3de 551, 558 (5th Cir. 1997), as authority for their opinion that "there is no *Brady* violation if the defendant, using

reasonable diligence, could have obtained the evidence himself." Opinion at 11.

However, the Court is relying on case law that has been indirectly overturned or not adopted. The *Thomas* opinion fails to acknowledge that *In re the Personal Retrain of Benn* was overturned on habeas review. See. *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), cert denied, 537 U.S. 942 (2002) (holding that the state court ruling was clearly erroneous and constitutes an "unreasonable application" of *Brady* and its progeny). The Ninth Circuit found the *Brady* violation so egregious in the Benn case that it did not rule directly on the question of whether or not a defendant has an obligation to seek out information which the State is suppressing. *Benn* at 1061. However, the Ninth Circuit in its opinion did state it thought the concept was " overbroad, at the very least" and that they need not consider whether it accurately stated the law in light of *Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995). *Id* at 1061-62.

The Court's opinion also cites Rector v. Johnson, 120 F.3dc 551, 558 (5th Cir. 1997) as support for the concept that due diligence is a component of *Brady*. The *Rector* case does add due diligence as a fourth component of a *Brady* violation. *Id*. The Fifth Circuit only cites other Fifth Circuit cases in support of this addition. Id. However, in the subsequent U.S. Supreme Court decision *Strickler v. Greene*, 527 U.S.

263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), the Court made clear that a Brady claim has only three components, and does not add due diligence as an additional components.

In fact, the U.S. Supreme Court has held that Brady applies even where a defendant never requested disclosure of the information. *United States v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Kyles*, 514 U.S. at 434-35.

In this case, some of the information was requested by the defense. The defense requested PIPI documents, Health Insurance Authorization and detailed Clothier & Head billing records. CP 1073-1081, 3495-3499; RP 10/5/05 p. 14 & 15. None were produced despite Mr. Rekdal having possession of this information before the trial began. Mr. Rekdal's doubts and opinions about Mr. Rennebohm and Mr. Rekdal's trial testimony or information about his conflict of interest were not subpoenaed. However, under *Agurs*, *Bagley* and *Kyles* this is not an excuse for non-disclosure. When Mr. Rekdal was asked why he had not disclosed information, Mr. Rekdal responded because he was not asked. CP 6564 (Deposition p. 246)

Even if such a diligence standard existed there is no reason to believe that Ms. Mullen could have obtained all of the withheld information on her own. The Court's conclusion that Ms. Mullen could

have discovered most of this evidence on her own fails to understand what Mr. Rekdal withheld and why he withheld the information. Mr. Rekdal failed to disclose the information he had in his possession because his professional obligation to his former client (Frontier Ford/Mr. Rennebohm) prevented it. CP 1266. That obligation existed and prevented disclosure regardless of whether the defense or the State requested the information.

The majority of the information that was discovered was as a result of the civil suit between Peninsula Auto World and Clothier & Head for professional malpractice. Mr. Rekdal was able to discuss the confidential information because it was being asserted as a defense to malpractice by that client, and therefore the privilege was waived. But for a mistake by a King County Superior Court Clerk's office employee the information would have never come to light, as it had been sealed as containing confidential information.

The court's opinion that the PIPI evidence should have obtained directly from the issuing company is not supported by existing case law. Both Mr. Rennebohm and Mr. Rekdal were asked about this before trial and denied having any information. It was reasonable for the defense to assume they would not be able to obtain the evidence elsewhere. See, *United States v. Bagley*, 473 U.S. at 682-683. The *Brady* doctrine as

discussed above does not require the defense to obtain information elsewhere.

d. The Evidence Withheld Viewed Cumulatively Undermines the Confidence In The Outcome of The Trial

The standard for determining materiality under *Kyles* is "not whether the defendant more likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines the confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

It can be difficult to reconstruct post-trial what course the defense and the trial would have taken had the suppressed material been available. See *Bagley*, 473 U.S. at 683. In this case, had the documents from the civil lawsuit between Frontier Ford and Clothier and Head been made available to the defense Ms. Mullen would have been able to corroborate her defense testimony. The Prosecutor would not have been able to conduct the cross examination that he did or give the closing argument that he gave that mocked Ms. Mullen and her story. RP 2/1/06 p. 52 (cross exam.), 2/2/06 p. 18 (closing argument). Additionally, the

Prosecution's two main witnesses' testimony (Rekdal and Rennebohm) would have been significantly impeached; there is a much greater likelihood that the jury would have discounted or disbelieved their testimony. Without solid unimpeached testimony from their two main witnesses the State's case would have been significantly weaker and with the corroborating evidence Ms. Mullen's defense would have been markedly stronger. These differences can reasonably be taken to put the case in such a different light as to undermine the confidence in the verdict. As a result, Ms. Mullen did not receive a fair trial and this Court should find that a Brady Violation occurred entitling Ms. Mullen to a new trial.

e. Mr. Rekdal Was A State Actor And Subject To The Requirements of Brady

A Brady violation occurs when the State suppresses material evidence. *See, Brady v. Maryland*, 373 U.S. 83 (1963). Mr. Rekdal is an agent of the State because he was hired to investigate the alleged crime, was substituted for the police, and then called as the State's expert witness. This extends the Brady obligation to evidence in Mr. Rekdal's possession.

The Brady requirements extend to evidence beyond that actually known to the prosecutor because the Prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *See, Kyles* 514 U.S. at 437.

In this case, Detective Nordmark, of the Anacortes Police Department testified during trial that the police department determined early on in the investigation that it did not have the expertise or resources to investigate the alleged crime. RP 1/30/06, p. 94, lines 5-13. Nordmark further testified that he had hoped to get assistance from the State Attorney General's office but he didn't get his way. RP 1/30/06, p.94, lines 14-25. The Prosecutor instead hired Rick Rekdal, who was also the alleged victim's personal and corporate CPA, to investigate and be a witness on behalf of the State.

Mr. Rekdal didn't just assist or consult; he was the central figure in the State's team. Detective Nordmark testified that the police role was limited to the initial response and gathering information requested by Mr. Rekdal. See generally, RP 1/5/06, p.75, 1/6/06, p.44, 1/11/06, p. 26. Additionally, after Ms. Mullen was convicted the State submitted a cost bill seeking reimbursement for "accounting fees for investigation" billed by Mr. Rekdal and his firm for over $200,000. CP 4495-4505.

Further, Mr. Rekdal understood his role as an agent of the State. In a declaration Mr. Rekdal avers that he learned of Mr. Rennebohm's own embezzlement while assisting the State's investigation. CP 5388.

The State should not be able to escape its *Brady* obligation by hiring an outside investigator rather than using a State agency to

investigate. Indeed the court recognized the pitfalls of the argument that the Prosecutor should not be responsible, under Brady, for information he does not have when the court reasoned that "any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Kyles v. Whitley*, 514 U.S. at 438.

Additionally, the 9th Circuit found that "exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor doesn't have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them." *United States v. Zuno-Acre*, 44 F.3d 1420, 1427, (9th Cir.), cert denied, 516 U.S. 945 (1995).

The court in *Kyles* also found that the "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf..." Id at 437. In this case there is evidence that the prosecutor did not undertake to learn of favorable evidence known to Mr. Rekdal. In a deposition taken after trial Mr. Rekdal was asked about his

testimony during the criminal trial that he believed Ms. Mullen was not authorized to take money for her own benefit and if that belief had changed. Mr. Rekdal replied "I don't know what to believe anymore". Mr. Rekdal was then asked if he had shared that hesitancy with the prosecuting attorney. Mr. Rekdal replied "He's not asked". CP 6564. The prosecutor was aware of the lawsuit between Mr. Rekdal and Mr. Rennebohm and he did not ask his investigator and witness about it. The prosecutor also felt it was "not his duty to go out and get pleadings like this and try to figure out what these ancillary lawsuits are about." RP 1/17/06 p. 11, lines 1-4.

Under *Kyles* the information and documents within Mr. Rekdal's knowledge was subject to *Brady* and failure to disclose that information was a violation of Ms. Mullen's constitutional right to a fair trial.

E. Conclusion

The State withheld material information from Ms. Mullen that was exculpatory and impeaching of the State's two main witnesses. The Appellate Court's opinion was inconsistent with the factual record of the case and its legal analysis is contrary to precedential case law. Accordingly, this court should reverse and grant Ms. Mullen the opportunity for a new trial.

Dated this 20th Day of August, 2010

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